FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1616

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

TRANS RENT-A-CAR, INC.,
Petitioner,

v.

THE HERTZ CORPORATION and
NATIONAL CAR RENTAL SYSTEM, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION*

INTRODUCTION

Petitioner, Trans Rent-A-Car, Inc., has petitioned this Court to review a decision of the Court of Appeals for the Ninth Circuit which affirmed the grant of summary judgment for respondents, The Hertz Corporation ("Hertz") and National Car Rental System, Inc. ("National"), in the only case that was left in the decade-old *Airport Car Rental Antitrust Litigation* (MDL 338). The decision below involves no conflict among courts of

* Pursuant to Rule 28.1, respondents certify that the parent company of The Hertz Corporation is UAL, Inc. and that the parent company of National Car Rental System, Inc. is Household International, Inc. Neither respondent has subsidiaries or affiliates whose disclosure is required by Rule 28.1.

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appeals and no unsettled or novel issue that merits review by this Court. It is of significance only to the parties to this one case — one plaintiff and two defendants. Moreover, even if this Court were to reject the reason set forth by the court of appeals in its opinion, the summary judgment would nevertheless have to be affirmed for reasons set forth in this Court's recent decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

STATEMENT

The *Airport Car Rental Antitrust Litigation* was spawned by a Federal Trade Commission complaint filed in June 1975 against Hertz, National and Avis Rent-A-Car System, Inc. ("Avis"), charging those companies with competing unfairly in connection with car rental concessions at various airports. Although the FTC proceeding was settled by consent in October 1976, early termination was not the order of the day for ensuing private actions brought by competitors of Hertz, National and Avis who claimed to have been excluded from various airport car rental concessions.

These private cases (which were consolidated in the Northern District of California as MDL 338) lingered for a number of years. As the private cases progressed, Hertz and National settled with the two largest plaintiffs, Budget Corporation and Dollar Rent-A-Car Systems, Inc., and Avis settled with all of the plaintiffs. There remained for adjudication the claims asserted against Hertz and National by (1) some 50 licensees of Budget Corporation and (2) Trans Rent-A-Car, Inc., which was a latecomer to both the car rental business and the *Airport Car Rental Antitrust Litigation*.

Trans Rent-A-Car, Inc. ("Trans"), which came into existence in 1969, had not attempted to obtain an airport car rental concession until 1972 (when it sought entry as the fourth operator at the San Diego airport but lost out

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to a Budget licensee). Trans did not intensify efforts to obtain car rental concessions at any other airport until 1974. Additionally, although most of the plaintiffs in the *Airport Car Rental Antitrust Litigation* brought suit by October 1977, Trans did not bring its action until February 1979 — more than two years after the FTC proceeding had been terminated. This procrastination by Trans precluded it from relying on the suspension of the statute of limitations that Section 5(i) of the Clayton Act, 15 U.S.C. 16(i), grants to private antitrust plaintiffs who sue within one year after termination of a government action.

Extensive discovery in MDL 338 made it clear that the essence of the claims being asserted by the private plaintiffs was that they had been damaged as a result of joint efforts by Hertz, National and Avis to persuade governmental authorities to adopt eligibility criteria and contractual requirements that had the effect of foreclosing and delaying entry by other car rental companies into the markets for on-airport car rental concessions. Using as a test case the claims of a Budget licensee with respect to airports in Washington and Oregon, Hertz and National moved for summary judgment in 1980, asserting that the plaintiffs' claims were barred by the *Noerr-Pennington* doctrine.[1]

In April 1981, Judge William W. Schwarzer of the United States District Court for the Northern District of California (to whom the *Airport Car Rental Antitrust Litigation* was assigned by the Judicial Panel on Multi-District Litigation) issued a lengthy opinion in which he ruled that the claims of the plaintiff in that test case were

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1. The "*Noerr-Pennington*" doctrine is used to refer to this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine also includes this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

barred by the *Noerr-Pennington* doctrine. *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981). In November 1982, the Court of Appeals for the Ninth Circuit affirmed, with an opinion that unequivocally declared that *Noerr-Pennington* protected the defendants' activities. *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982). That opinion established the fundamental principle that would thereafter govern the *Airport Car Rental Antitrust Litigation*. This Court denied certiorari. 462 U.S. 1133 (1983).

Hertz and National then moved for summary judgment against the remaining plaintiffs, pointing out that, since the *Noerr-Pennington* question had already been resolved in their favor by the Ninth Circuit, the only open question was whether any of the remaining plaintiffs could somehow establish that its claims fit within the so-called "sham" exception to *Noerr-Pennington*.

After their motions for summary judgment were filed, Hertz and National settled with the Budget licensees. That left for adjudication the claim of only one plaintiff, Trans.

In support of their summary judgment motion, Hertz and National pointed out in the district court that Trans' claim was fundamentally the same as the claims of the other plaintiffs — including the plaintiff whose claim had been rejected by the earlier opinions of the district court and the court of appeals — namely a claim by a competitor that it had been excluded from on-airport car rental concessions as a result of joint efforts by Hertz, National and Avis to persuade governmental authorities to adopt restrictive eligibility criteria and contractual requirements.

While Trans tried to argue that the "sham" exception to *Noerr-Pennington* precluded summary judgment, the record before the district court showed that: (1) notwithstanding extensive discovery, Trans had not

produced any evidence whatsoever of bribery or other corruption of governmental officials at any of the airports from which it claimed to have been excluded; (2) Trans had not produced any evidence of misrepresentations by the defendants that corrupted the decision-making process; (3) Trans' complaint about joint efforts by the defendants to convince airport officials to agree to proposed concession rates or to impose minimum guarantees were complaints about matters that were plainly immunized from attack under *Noerr-Pennington* and had nothing to do with the "sham" exception; and (4) Trans lacked standing to pursue any claims based on alleged agreements among Hertz, National and Avis to raise prices to customers, since Trans would have been a beneficiary (rather than a victim) of any such price-fixing by its competitors.

In March 1984, Judge Schwarzer entered summary judgment in favor of Hertz and National, holding that Trans had "not come forward with any facts that could raise a triable issue" on the applicability of the "sham" exception to *Noerr-Pennington* (Pet. App. 17a). Once again, the court of appeals affirmed.

The initial opinion of the court of appeals in support of the affirmance of the summary judgment against Trans (July 22, 1985) said, among other things, that Trans could not rely on certain evidence contained in deposition transcripts that were not filed of record in view of the express provisions of Rule 30(f) of the Federal Rules of Civil Procedure (Pet. App. 23a). However, after Trans petitioned for rehearing, the court of appeals withdrew all reference to that technical point as a basis for its decision (Pet. App. 1a).

In its final opinion (dated October 7, 1985), the court of appeals said, *inter alia,* that certain "evidence" upon which Trans relied to show "price-fixing" had to be excluded from consideration because it was time-barred (Pet. App. 6a-7a). It is this latter ruling which Trans

challenges in its petition and which it asks this Court to review.

ARGUMENT

The court of appeals was manifestly correct in ruling that Trans' "evidence" of "price-fixing" was time-barred. The two witnesses whose testimony forms the basis of the argument that Trans advances in its petition — George Akoboff and Gene Nelson — were clearly testifying about events that were barred by the Clayton Act's four-year statute of limitations (15 U.S.C. § 15b) at the time Trans brought its suit in February 1979. The excerpt from Mr. Akoboff's testimony quoted in the appendix to Trans' petition shows, on its face, that Mr. Akoboff was testifying about something that happened in 1969 (Pet. App. 35a). And the transcript of Mr. Nelson's testimony makes it abundantly clear that Mr. Nelson was testifying about events that occurred in 1973 or earlier (See, *e.g.*, Nelson Deposition, 3:4, 73:9, 132:10-16). Since the four-year limitations period set forth in Section 4B of the Clayton Act serves to bar all claims by Trans based on events that predated February 1975, the Akoboff and Nelson testimony could not help Trans even if the testimony did show "price-fixing" and even if Trans somehow could establish standing to assert an antitrust claim based on price-fixing by its competitors.

Trans quotes an excerpt from a footnote on page 6 of the memorandum that Hertz and National filed in support of their summary judgment motion in the district court and argues that this excerpt shows that Hertz and National "specifically excluded the statute of limitations from their motion for summary judgment" (Petition 7-8). That is not so. Other portions of that very same memorandum make it clear that Hertz and National did rely in the district court on the fact that the testimony of Nelson and Akoboff (among others) related to periods of time for

which recovery was barred by the statute of limitations.[2] The excerpts quoted by Trans in its petition merely relate to the fact that the motion for summary judgment was based on the *Noerr-Pennington* doctrine. But that is not to say — and was not to say — that the defendants waived the right to rely upon the statute of limitations as a reason for rejection of Trans' attempt to call into play the "sham" exception to that doctrine.

Finally, Trans attempts to suggest in its petition that it should be given the opportunity to avoid the statutory bar by showing that the "price-fixing" was "fraudulently concealed" by the defendants. But Trans has presented nothing — to this Court or to the courts below — to support any claim of "fraudulent concealment." And, although Trans was given repeated opportunities to specify any issues on which it wanted additional discovery (Pet. App. 8a, 10a-13a), Trans made no attempt to take any additional discovery on "concealment." Moreover, Trans' claim of "concealment" relates only to the charge that Hertz, National and Avis conspired to raise prices to their retail customers. As noted earlier, Trans simply has no standing to complain about that alleged conspiracy. See this Court's March 26, 1986 opinion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1361 n.20 ("Respondents — petitioners' competitors — suffer no harm from a conspiracy to raise prices.").

In short, the entry of summary judgment against Trans was a simple and correct application of the law.

2. For example at page 17 of their summary judgment memorandum, Hertz and National said that the "price-fixing" argument should be rejected for a number of reasons, including:

> "*Second* most of plaintiffs' vague 'evidence' of 'price-fixing' relates to a period of time prior to June 10, 1971 and, therefore, falls outside the period for which recovery is available to any of the airport car rental antitrust plaintiffs under the applicable statute of limitations."

Moreover, the decision below does not involve any conflict among courts of appeals or any unsettled or novel issue that merits elucidation by this Court, the decision being of no significance to anyone other than the one plaintiff and the two defendants in this single case. The court should permit the book to be closed on this final, non-essential, chapter of the *Airport Car Rental Antitrust Litigation*.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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